

SENATE LOCAL GOVERNMENT

EXHIBIT NO. 2

DATE 1-18-07

BILL NO. Information

**A Critical Analysis
of Planning
and
Land-Use Laws
in Montana:**

A REPORT OF THE
AMERICAN PLANNING ASSOCIATION
RESEARCH DEPARTMENT
PREPARED FOR THE MONTANA
SMART GROWTH COALITION

January 2001

American Planning Association
122 South Michigan Avenue, Suite 1800
Chicago, Illinois 60603, 312-431-9190

Montana Smart Growth Coalition
P.O. Box 543
Helena, MT 59624; 406-449-6186

Finally, the state's historic preservation officer, subject to the supervision of the director of the state historical society, is required to prepare and annually review the state preservation plan, historic register nominations, and historic preservation grant activity.⁶

3.0 ANALYSIS OF ENABLING LEGISLATION FOR LOCAL PLANNING AND LAND-USE CONTROL

This section contains an overview of the substantive provisions of the Montana Code Annotated (MCA) as it relates to planning, zoning, subdivision, and related statutes. It integrates relevant Montana Supreme Court decisions and Attorney General opinions. This analysis is intended to provide a context for the analysis of the results of the focus groups and survey respondents as well as the recommendations for change that appear in the following sections.

3.1 PLANNING BOARDS

MCA 76-1-101 authorizes the governing body of any city or town, of more than one city or town, or of any county or combination thereof to create a planning board. The statutes encourage cooperative city-county planning where possible. For example, where a city council intends to create a city planning board, it must notify the county commissioners in writing of its intent to do so. The county commissioners in turn must decide within 30 days whether to form a city-county planning board or to permit the city to establish a city planning board on its own.⁷

The statutes provide that, once established, the planning board "shall prepare a growth policy" (emphasis supplied). "Growth policy" is the Montana term for a local comprehensive plan. The planning board "shall serve in an advisory capacity" to the local governing bodies that create it. The planning board may also propose "policies" for subdivision plats, the development of public ways, public places, public structures, and public and private utilities; the issuance of improvement location permits on platted and unplatted land; or the laying out and development of public ways and services to platted and unplatted lands.⁸

The governing body of any city, town, or county that has formed a planning board and adopted a growth policy and subdivision regulations *must* seek the advice of the appropriate planning board in all matters pertaining to the approval or disapproval of plats or subdivisions. However, the planning board may delegate to its staff the responsibility to advise the governing body on any or all proposed minor subdivisions.⁹ A city-county planning board may serve as the municipal zoning commission at the discretion of the city council.¹⁰ The governing

⁶MCA 22-4-423(5).

⁷MCA 76-1-105, MCA 76-1-112 also authorizes the conversion of existing city, county, or city-county planning boards into a joint city-county planning board with any other similar board or combination of boards. This is accomplished through an interlocal agreement.

⁸MCA 76-1-106. It is not clear whether the "policies" that a planning board may recommend are to be incorporated in the growth policy or are to be separate. The term, "improvement location permits," is not defined in the statute, but it appears to mean an authorization to construct public improvements.

⁹MCA 76-1-107.

¹⁰MCA 76-1-108, citing MCA 76-2-307. A county planning board cannot be designated, however, as the county zoning commission under MCA 76-2-202, but there is nothing in either the planning or zoning statute to prohibit a person qualified to be on both bodies from being appointed to both. 43 Op. Att'y Gen. 52 (1989).

bodies of the city or county must "give consideration" to the recommendations of the city-county planning board, but are not bound by such recommendations.¹¹

A city-county planning board must consist of not less than nine members, a county planning board not less than five members, and a city planning board not less than seven members; the composition of membership is governed by a statutory formula.¹² A citizen member of a city planning board must be "qualified by knowledge and experience in matters pertaining to the development of the city," but there is no similar requirement for citizen members of the city-county or county planning board.¹³

The city or county must provide suitable offices for the holding of meetings and the preservation of plans, maps, documents, and accounts for the planning board.¹⁴ The planning board must, among other things, provide an annual report to governing bodies represented on the board concerning the operation of the board and the status of planning within its jurisdiction.¹⁵ The board may appoint and prescribe the duties and fix the compensation of a secretary and any employees as are necessary to perform the duties and responsibilities of the board.¹⁶ Board members do not receive salaries for their duties, but may be reimbursed for transportation and actual expenses in connection with attending board meetings. The board may also pay for board members' and employees' actual expenses in attending regional or national conferences dealing with planning in another city, county, or state.¹⁷

A planning board is charged by statute with supervising its fiscal affairs and must submit an annual budget in the same manner as other departments of city and county governments. Funding for board operations are by appropriations made by the city or county governing bodies. The planning statutes authorize governing bodies to levy taxes for planning board purposes; depending on the type of county or city or town, the levy may not exceed between two to six mills.¹⁸ Planning boards may also accept gifts, donations, and grants. An unusual provision also authorizes the planning board to accept "any property (real, personal, or mixed) or any improved or unimproved park or playground."¹⁹

3.2 GROWTH POLICY

Under MCA 76-1-601, a planning board "shall prepare and propose a growth policy for the entire jurisdictional area." A "growth policy" is defined as "synonymous with a comprehensive development plan, master plan, or comprehensive plan that meets the requirements of

¹¹MCA 76-1-109.

¹²MCA 76-2-101 (city-county planning board); MCA 76-1-211 (county planning board); MCA 76-1-221 (city planning board).

¹³MCA 76-1-224 (city planning board). Compare with MCA 76-1-202 (qualifications of citizen members of city-county planning board) and MCA 76-1-212 (citizen members of county planning board).

¹⁴MCA 76-1-303.

¹⁵MCA 76-1-305.

¹⁶MCA 76-1-306.

¹⁷MCA 76-1-307.

¹⁸MCA 76-1-402 to -407.

¹⁹MCA 76-1-408.

76-01-601."²⁰ The requirement for a growth policy is the result of amendments made to the statutes in 1999.

The statutes require that a growth policy include:

(a) community goals and objectives;

(b) maps and text describing an inventory of the existing characteristics and features of the jurisdictional area, including land uses; population; housing needs; economic conditions; local services; public facilities; natural resources; and other characteristics and features proposed by the planning board and adopted by the governing bodies;

(c) projected trends for the life of the growth policy for the topical areas listed in (b) above;

(d) a description of policies, regulations, and other measures to be implemented in order to achieve the community goals and objectives;

(e) a strategy for development, maintenance, and replacement of public infrastructure including drinking water systems, wastewater treatment facilities, sewer systems, solid waste facilities, fire protection facilities, roads, and bridges;

(f) an implementation strategy that includes a timetable for implementing the growth policy; a list of conditions that will lead to a revision of the growth policy; a timetable for reviewing the growth policy at least once every five years and revising the policy if necessary;

(g) a statement explaining how governing bodies (cities, towns, and counties) will cooperate and coordinate with other jurisdictions; and

(h) a statement explaining how the governing bodies will define the "criteria" for subdivision review described in MCA 76-3-603(3)(a). These criteria include "the effect on agriculture, agricultural water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety." In addition, the statement must explain how the governing bodies will evaluate and make decisions regarding proposed subdivisions in connection with these subdivisions, and how public hearings regarding proposed subdivisions will be conducted.²¹

The statutes also permit the planning board to include one or more neighborhood plans as part of the growth policy.²² MCA 76-1-601(3)(c) to

²⁰MCA 76-1-103(4).

²¹MCA 76-1-601(2)(a) to (2)(h). This description paraphrases the language in the statutes.

²²MCA 76-1-601(3)(c). But a neighborhood plan "must be consistent with the growth policy" or comprehensive or master plan. See *Ash Grove Cement Company v. Jefferson County*, 943 P.2d 85 (Mont. 1997). Here, the Court held that a "local vicinity plan" (LVP) was inconsistent with and violated the mandate of the master plan, which authorized LVPs only to the extent they were consistent with the master plan and designed to implement it; the LVP described the area it covered as rural residential and, in doing so, ignored the physical presence of a cement plant and the master plan's classification of area around the cement plant and quarries as mining and industrial, but also purported to change the classification to a designation totally at odds with that contained in the master plan. Noting the requirement in MCA 76-1-601 for a survey of existing land uses, the Court also held that, because the LVP disregarded the actual use of land for areas to which it purported to apply, it was not a proper amendment to the master plan, *id.*, at 93. The Court, in *Ash Grove*, expresses concern over the "piecemeal" adoption of amendments, commenting that while MCA 76-1-601 authorizes revision of a master plan "nothing in that statute supports the notion that revisions can be made which alter the master plan's inherent jurisdiction wide nature and result in a patchwork plan for the jurisdictional area," and quoting Daniel R. Mandelker, "The Role of the Local Comprehensive Plan in Land Use Regulation," 74 *Mich.L.Rev.* 839, 946 (1976), *id.*, at 93.

(f), taken together, provide that the growth policy may identify geographic areas where subdivisions would be exempted from the criteria for subdivision review described in MCA 76-3-608(3)(a). This exemption can occur when there is an assessment of the effect of subdivision on the criteria and the local governing body has adopted zoning regulations that are intended to address the subdivision review criteria. While not entirely clear, this language appears to suggest that (a) if a local government conducts an assessment of the overall impact of anticipated subdivision of a geographic area described in the growth policy, and (b) proposes and then adopts zoning regulations (*not* subdivision regulations) that would somehow address mitigation of impacts resulting from the overall pattern of subdivision in that geographic area, then (c) subdivision occurring within that area would be exempt from application of these criteria.

The planning board is charged with holding a public hearing on the growth policy and then recommending to the governing bodies the growth policy and "any proposed ordinances and resolutions for its implementation."²³ The governing bodies may then adopt or revise a growth policy (or any of its parts), or reject it. They may also repeal it. If the governing bodies adopt a resolution of intention to adopt the growth policy, they may, in their discretion, submit the adoption to a referendum vote at the next general or special election. In addition, the qualified electors of the jurisdictional area included within the growth policy may by initiative or referendum adopt, revise, or repeal a growth policy.²⁴

Upon adoption of the growth policy, the governing bodies "must be guided by and give consideration to the general policy and pattern of development set out in the growth policy." This is to apply to the: (a) authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities; (b) authorization, acceptance, or construction of water mains, sewers, connections, facilities, or utilities; (c) adoption of subdivision controls; and (d) adoption of zoning ordinances or resolutions.²⁵ The statutes also provide that when a growth policy has been "approved," the city council or board of county commissioners may by ordinance or resolution, respectively, require subdivision plats to conform to the provisions of the growth policy. The governing bodies must then refer subdivision plats to the planning board to advise it as to compliance or noncompliance with the growth policy.²⁶ In the event of a proposed annexation under MCA Title 2, Part 47 (annexation with provision of services), the municipal governing body can only annex areas that, among other things, "conform to a growth policy."²⁷

3.3 ZONING IN UNINCORPORATED AREAS

Zoning in unincorporated areas can occur by two methods: (1) the creation of a planning and zoning district, which must be a minimum of 40

Upon adoption of the growth policy, the governing bodies "must be guided by and give consideration to the general policy and pattern of development set out in the growth policy."

²³MCA 76-1-603.

²⁴MCA 76-1-604. This section is problematic because a growth policy is a condition precedent to the adoption of a zoning ordinance under the county (Part 2) and municipal zoning enabling acts. If a growth policy is repealed by initiative, or there are parts of it that are repealed, and the growth policy no longer meets the requirements of the planning statutes, then there will be the question of whether the zoning ordinance remains valid.

²⁵MCA 76-1-605.

²⁶MCA 76-1-606. While this section refers to an "approved" growth policy, the other statutory provisions treat such a policy as "adopted."

²⁷MCA 7-2-4734(3).